UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NWDC RESISTANCE, et al., Plaintiffs, v. IMMIGRATION & CUSTOMS ENFORCEMENT, et al., Defendants.	CASE NO. C18-5860JLR ORDER DENYING MOTION TO DISMISS AND MOTION TO STAY

I. INTRODUCTION

Before the court are two motions filed by Defendants Immigration & Customs Enforcement ("ICE"), Tae D. Johnson, and Alejandro Mayorkas (collectively, "Defendants"): (1) a motion to dismiss this matter as moot (MTD (Dkt. # 87); MTD Reply (Dkt. # 109)); and (2) a motion to stay discovery pending the court's decision on the motion to dismiss (MTS (Dkt. # 92); MTS Reply (Dkt. # 110); MTS Supp. Mot. (Dkt. # 117); 6/3/22 Order (Dkt. # 118)). Plaintiffs NWDC Resistance ("La Resistencia") and

Coalition of Anti-Racist Whites ("CARW") (collectively, "Plaintiffs") oppose the motions. (MTD Resp. (Dkt. # 104); MTS Resp. (Dkt. # 102).) The court has considered the motions; the parties' submissions in support of and in opposition to the motions; the relevant portions of the record; and the applicable law. Being fully advised,[1] the court DENIES Defendants' motion to dismiss and DENIES their motion to stay discovery as moot.

II. BACKGROUND

The court set forth Plaintiffs' allegations in detail in its October 8, 2020 order denying Defendants' second motion to dismiss.[2] (10/8/2020 Order (Dkt. # 70) (denying motion to dismiss for lack of subject matter jurisdiction).) Therefore, the court focuses here on the background relevant to the instant motions to dismiss and to stay.

Plaintiffs filed this lawsuit on October 23, 2018. (*See* Compl. (Dkt. # 1).) They allege that ICE has engaged in a "pattern and practice of selectively enforcing immigration laws against outspoken immigrant rights activists who publicly criticize U.S. immigration law, policy, and enforcement" since January 2017. (Am. Compl. (Dkt. # 13) ¶ 9.) They further allege that ICE "investigated, surveilled, harassed, raided, arrested, detained, and deported those activists immediately following press appearances and news conferences;" "detained spokespeople and directors of immigration advocacy

[1] No party requests oral argument on the motions to dismiss and to stay (*see* MTD at 1; MTD Resp. at 1; MTS at 1; MTS Resp. at 1) and the court concludes that oral argument would not be helpful to its disposition of the motions, *see* Local Rules W.D. Wash. LCR 7(b)(4).

[2] The court also denied Defendants' first motion to dismiss on May 30, 2019. (5/30/19 Order (Dkt. # 30) (denying motion to dismiss or stay under the first-to-file rule).)

organizations;" and "surveilled the organizations' headquarters and targeted their members." (*Id.* ¶ 10.) Plaintiffs describe several instances of ICE's alleged practice of targeting their members, including La Resistencia leader Maru Mora-Villalpando, for selective enforcement in 2017 and 2018. (*See id.* ¶¶ 16-52.) Plaintiffs also allege that, as a result of ICE's actions, their organizations were forced to divert resources to assist the targeted individuals and to limit participation in activist work due to their members' fear of retaliation. (*Id.* ¶¶ 53-84.) ICE's actions, according to Plaintiffs, violated then-current Executive Orders and agency policies, "none of which," they assert, "permit using immigration enforcement to retaliate against immigrant rights activists for their protected political speech." (*Id.* ¶ 101.) Plaintiffs allege claims for violations of the First Amendment (*id.* ¶¶ 85-93), the Due Process Clause of the Fifth Amendment (*id.* ¶¶ 94-96), the Administrative Procedure Act, 5 U.S.C. § 706 (*id.* ¶¶ 97-103); and the Equal Protection Clause (*id.* ¶¶ 104-07). They seek both a declaration that ICE's alleged policy of retaliatory enforcement based on protected political speech violates the First and Fifth Amendments and a permanent injunction restraining Defendants from selectively enforcing immigration laws based on protected political speech. (*Id.* at 20-21). They do not seek monetary damages. (*See id.*)

In April 2021, the court granted Defendants' motion to stay this case for 90 days after the change in the presidential administration in January 2021. (4/8/21 Order (Dkt. # 75).) Defendants asked for the stay to allow time for new Department of Justice officials to become familiar with this case; to evaluate whether new immigration enforcement priorities would be issued that could affect this case; and in anticipation of

the issuance of new civil immigration enforcement guidelines. (*Id.* at 3 (citing 1st MTS (Dkt. # 71) at 1-3).)

On September 30, 2021, the Department of Homeland Security ("DHS"), through Secretary Alejandro N. Mayorkas, issued new *Guidelines for the Enforcement of Civil Immigration Law* (the "New Guidelines"), which went into effect on November 29, 2021. (10/26/21 Stip. Mot. (Dkt. # 77), App'x A ("New Guidelines").) The New Guidelines emphasize the importance of prosecutorial discretion and prioritize the enforcement of immigration laws where a noncitizen poses a threat to "national security, public safety, and border security." (*Id.* at 2-3.) With respect to the protection of "civil rights and civil liberties," the New Guidelines state, in relevant part:

> We must exercise our discretionary authority in a way that protects civil rights and civil liberties. The integrity of our work and our Department depend on it. A noncitizen's race, religion, gender, sexual orientation or gender identity, national origin, or political associations shall never be factors in deciding to take enforcement action. A noncitizen's exercise of their First Amendment rights also should never be a factor in deciding to take enforcement action. We must ensure that enforcement actions are not discriminatory and do not lead to inequitable outcomes.

(*Id.* at 5.) The New Guidelines require that certain measures be taken "before the effective date" of the guidance, including "extensive training materials and a continuous training program"; a "review process . . . to ensure the rigorous review of . . . enforcement decisions throughout the first ninety (90) days of implementation of" the guidance, along with "longer-term review processes . . . drawing on the lessons learned"; a process to collect "detailed, precise, and comprehensive data" about enforcement actions taken; and the establishment of a "fair and equitable review process to afford

noncitizens and their representatives the opportunity to obtain expeditious review of the enforcement actions taken." (*Id.* at 5-6.) Finally, the New Guidelines state that the guidance "is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." (*Id.* at 7.)

After the New Guidelines were issued, ICE created a "foundational web-based training that provided instruction to Homeland Security Investigations [("HSI")] Special Agents and ICE Enforcement and Removal Operations [("ERO")] Officers so that they would better understand how to exercise discretion in the course of their official duties." (Mot at 5 (first citing Horton Decl. (Dkt. # 89) ¶¶ 4, 6; and then citing Putnam Decl. (Dkt. # 90) ¶ 4).) The HSI Agents and ERO Officers were required to complete the training by December 6, 2021. (Horton Decl. ¶ 6; Putnam Decl. ¶ 4.) ERO also conducted town hall meetings to discuss the New Guideline with officers and staff; created monthly training scenarios based on cases encountered in the field; and developed training for supervisors. (Putnam Decl. ¶¶ 5-6.)

In October 2021 and January 2022, the court granted the parties' stipulated motions to stay this case to allow the parties the opportunity to review the New Guidelines and discuss the possibility of settlement. (10/26/21 Order (Dkt. # 78); 1/25/22 Order (Dkt. # 81).) On March 21, 2022, the parties informed the court that their attempt to mediate the case was unsuccessful. (3/21/22 OSC Resp. (Dkt. # 84).) Accordingly, the court lifted the stay (over Defendants' objection) and set a bench trial on April 24,

2023. (3/21/22 Order (Dkt. # 85); Sched. Order (Dkt. # 86).) The instant motions followed.

III. ANALYSIS

Defendants contend that Secretary Majorkas's issuance of the New Guidelines mooted this case and thus mandates its dismissal. Below, the court sets forth the legal standards that govern the court's consideration of whether this case is moot, and then applies those standards to Defendants' motion to dismiss.

A. Legal Standards

A party may move to dismiss an action for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A federal court does not have jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). Thus, mootness deprives federal courts of subject matter jurisdiction because federal courts are empowered to hear only cases and controversies. U.S. Const. art. III § 2; *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974).

There is "no case or controversy, and a suit becomes moot, 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). When determining whether a case is moot, "the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief." *NW*

Envtl. Def. Ctr. v. Gordon, 849 F.2d 1241, 1244-45 (9th Cir. 1988) (quoting *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986)). A case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin*, 568 U.S. at 172 (citation omitted). The party alleging mootness bears a "heavy" burden to establish that the court can provide no effective relief. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (quoting *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006)).

A defendant's "voluntary cessation of challenged conduct does not necessarily render a case moot because, if the case were dismissed as moot, the defendant would be free to resume the conduct." *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (first citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); and then citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33 (1953)). Voluntary cessation can, however, moot a case "'if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (quoting *Friends of the Earth*, 528 U.S. at 189).

Where, as here, a government entity argues that a voluntary policy change that is not reflected in a statute or regulation moots an action, it must be "'absolutely clear' to the court, considering the 'procedural safeguards' insulating the new state of affairs from arbitrary reversal and the government's rationale for its changed practice(s), that the activity complained of will not reoccur." *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1039 (9th Cir. 2018) (citing *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir.

2015)). A government agency can meet this burden by "persuading the court that the change in its behavior is 'entrenched' or 'permanent'." *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1153 (9th Cir. 2019) (quoting *Fikre*, 904 F.3d at 1037 (quotation marks omitted)). Courts in the Ninth Circuit apply a "'loose framework' of non-exhaustive considerations" when evaluating whether such a policy change moots an action. *Id.* at 1153 (citing *Rosebrock*, 745 F.3d at 972). These considerations include: (1) whether "the policy change is evidenced by language that is 'broad in scope and unequivocal in tone'"; (2) whether the new policy "addresses all of the objectionable measures that [agency] officials took against the plaintiffs" under the old policy; (3) whether the case at issue "was the catalyst for the agency's adoption of the new policy"; (4) whether "the policy has been in place for a long time"; and (5) whether, "since the [new policy's] implementation[,] the agency's officials have not engaged in conduct similar to that challenged by the plaintiff." *Rosebrock*, 745 F.3d at 972 (citing *White v. Lee*, 227 F.3d 1214, 1243-44 (9th Cir. 2000)). Courts, however, are "less inclined to find mootness where the 'new policy . . . could be easily abandoned or altered in the future.'" *Id.* (quoting *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013)). "Ultimately, the question remains whether the party asserting mootness 'has met its heavy burden of proving that the challenged conduct cannot reasonably be expected to recur.'" *Id.* (quoting *White*, 237 F.3d at 1244).

//

//

//

B. Defendants' Motion to Dismiss

Defendants move to dismiss Plaintiffs' amended complaint under Federal Rule of Civil Procedure 12(b)(1). (*See generally* MTD.) They argue that because the New Guidelines "expressly prohibited employees from using a noncitizen's exercise of their First Amendment rights as a factor in deciding to take civil immigration enforcement action," the constitutional violations at issue in the amended complaint cannot reasonably be expected to recur. (*Id.* at 10.) As a result, according to Defendants, the court cannot grant Plaintiffs any effective relief—either because there is "nothing left to enjoin" or because there is no "substantial controversy. . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment"—and the case is moot. (*Id.* at 10-11 (first quoting *California v. Douglas*, 757 F.3d 975, 982 (9th Cir. 2014); and then quoting *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005)).) Plaintiffs disagree. (*See generally* MTD Resp.) They contend that the New Guidelines do not constitute a policy change at all, but rather represent an "easily altered" policy that simply reiterates prohibitions on the use of protected speech as a factor in immigration enforcement actions that were present in policies that predated the New Guidelines. (*See id.* at 8-13.) They also argue that Defendants cannot meet their heavy burden to demonstrate that it is absolutely clear that further violations of Plaintiffs' members' First Amendment rights could not reasonably be expected to recur. (*See id.* at 1, 13-18.)

Because both parties direct the court to the *Rosebrock* factors for evaluating whether an internal policy change moots an action, the court considers the parties'

arguments in the context of its consideration of those factors. The court concludes that Defendants have not met their burden to establish that this action is moot.

As an initial matter, the court agrees with Plaintiffs that it is questionable whether the New Guidelines set a new policy governing the use of noncitizens' protected speech in making immigration enforcement decisions. As Plaintiffs point out, DHS issued guidance in May 2019 stating that the agency "does not profile, target, or discriminate against any individual for exercising his or her First Amendment rights." (*See* MTD Resp. at 4 (quoting *Information Regarding First Amendment Protected Activities*, Dep't Homeland Sec. (May 17, 2019), https://www.dhs.gov/sites/default/files/publications/info_regarding_first_amendment_protected_activities_as1_signed_05.17.2019.pdf (memo from Acting DHS Secretary Kevin McAleenen to all DHS employees).) Thus, according to Plaintiffs, the New Guidelines—which mention the First Amendment in only one sentence—simply reiterate the agency's already-existing publicly stated position. (*Id.*) In addition, Plaintiffs allege that ICE has engaged in a pattern or practice of retaliation *despite* the existence of earlier Executive Orders and agency policies which, on their face, did not permit retaliation against noncitizens for their protected speech. (*See* MTD Resp. at 10-11; *see* Am. Compl. ¶ 101).) Defendants do not address Plaintiffs' comparison of the New Guidelines to earlier agency guidance in their reply. (*See generally* MTD Reply.)

Assuming, however, that the New Guidelines represent a change in agency policy regarding the consideration of protected speech in immigration enforcement decisions,

the court concludes that the *Rosebrock* factors counsel against a finding that this case is moot.

First, the court concludes that the policy change is not "evidenced by language that is broad in scope and unequivocal in tone." *Rosebrock*, 745 F.3d at 972. The New Guidelines's sole reference to First Amendment rights is a sentence within a paragraph that states that "a noncitizen's race, religion, gender, sexual orientation or gender identity, national origin, or political factors *shall* never be factors in deciding to take enforcement action" and that a "noncitizen's exercise of First Amendment rights *should* also never be a factor" in such a decision. (New Guidelines at 5 (emphasis added).) Nothing in the New Guidelines explains the reasons for the adoption of the purported new First Amendment policy or acknowledges the existence of a prior unlawful policy. *See Am. Diabetes Ass'n*, 938 F.3d at 1153 (finding language "broad and unequivocal" where the new policy "unequivocally renounce[d] the previously challenged" policy). Furthermore, the New Guidelines emphasize that enforcement decisions remain fully within the discretion of ICE officers and agents and that the New Guidelines are "not intended to, do[] not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." (New Guidelines at 7.) Although Defendants point to the programs they developed to train HSI and ERO agents and officers as evidence that their new policy is "broad and unequivocal" (*see* MTD at 13-14), the declarations and press releases they cite do not specifically address training about the protection of First Amendment rights (*see id.*; *see generally* Horton Decl.; Putnam Decl.; MTD Reply at 3-4 (quoting DHS

press releases[3]).) The court concludes, therefore, that the first *Rosebrock* factor weighs against mootness.

Second, the New Guidelines do not mention, much less "address[] all of the objectionable measures that agency officials took against" Plaintiffs' members and associates under its prior policies. *See Rosebrock*, 745 F.3d at 972; *see also Am. Diabetes Ass'n*, 938 F.3d at 1153 (finding the second *Rosebrock* factor met where the challenged prohibition on providing diabetes-related care had been repealed). Thus, the second *Rosebrock* factor also weighs against a finding of mootness.

Third, Defendants concede that this case was not "the catalyst for the agency's adoption of the new policy" and that, therefore, the third *Rosebrock* factor weighs against finding this case is moot. (*See* MTD at 14 (citing *Rosebrock*, 745 F.3d at 972).)

Fourth, there can be no dispute that the New Guidelines have not "been in place for a long time." *See Rosebrock*, 745 F.3d at 972. Rather, they went into effect on November 29, 2021—just over six months ago. (New Guidelines at 1.) In contrast, courts finding that the fourth factor weighs in favor of mootness have observed that the policy was in effect in for a period of years. *See, e.g., Am. Diabetes Ass'n*, 938 F.3d at 1153 (finding fourth factor met when the policy had been in place for over two years); *Rosebrock*, 745 F.3d at 974 (noting the policy change was announced over three years earlier). Defendants assert that First Amendment free speech rights, in general, are

[3] The court grants Defendants' request to take judicial notice of DHS's press releases as documents available on a government agency website. (*See* MTD Reply at 3 n.2); *Gustavson v. Wrigley Sales Co.*, No. 12-CV-01861-LHK, 2014 WL 60197, at *3 n.2 (N.D. Cal. Jan. 7, 2014).

"entrenched" and that there is "no indication that any Secretary would ever rescind the prohibition on initiating enforcement action based on the exercise of free speech." (MTD at 14-15.) But again, Plaintiffs allege that ICE has a pattern and practice of retaliatory enforcement *despite* the agency's publicly-stated policies. Thus, the court concludes that the fourth factor weighs against finding this case moot.

Finally, Defendants have not shown that ICE officials have not engaged in conduct similar to that challenged by Plaintiffs since the New Guidelines were implemented. *See Rosebrock*, 745 F.3d at 972. Defendants assert that Plaintiffs have no evidence that ICE officials have selectively targeted their members based on their protected speech since the 2017 and 2018 actions described in the amended complaint, much less since the new presidential administration began in January 2021 or since the New Guidelines were issued in September 2021. (MTD at 16.) As Plaintiffs point out, however, it is *Defendants'* burden—not theirs—to show that ICE's retaliatory conduct will not recur. (MTD Resp. at 17-18); *Rosebrock*, 745 F.3d at 972; *see also Fikre*, 904 F.3d at 1039 n.4 (noting that "the focus should not be on the absence of evidence" that the challenged conduct has continued because "that would improperly shift the evidentiary burden to [the plaintiff] to prove that the alleged violation will not reoccur"). Indeed, although (as Defendants repeatedly point out) courts presume that a government entity is acting in good faith when it changes its policies, Defendants nevertheless bear the "heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again." *Rosebrock*, 745 F.3d at 971. Accordingly, the court concludes that the final *Rosebrock* factor, too, weighs against finding mootness.

Because all of the *Rosebrock* factors weigh against a finding that this case is moot, the court DENIES Defendants' motion to dismiss. Further, because the court has decided the instant motion, it DENIES Defendants' motion to stay discovery pending the resolution of this motion to dismiss as moot.

IV. CONCLUSION

For the foregoing reasons, the court (1) DENIES Defendants' motion to dismiss (Dkt. # 87) and (2) DENIES Defendants' motions to stay discovery pending the court's resolution of the motion to dismiss (Dkt. # 92).

Dated this 9th day of June, 2022.

JAMES L. ROBART
United States District Judge